No. 93-1248

IN THE

Supreme Court of the United States

October Term, 1993

ROBERT L. DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Military Appeals

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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 members and supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the areas of criminal justice and crime victims' rights. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court. *See, e.g., Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including criminal law and public policy. AEF has appeared before this Court along with WLF in a number of cases raising constitutional issues.

Amici are deeply concerned about the proliferation of "prophylactic" rules that the Court has promulgated under the aegis of interpreting *Miranda v. Arizona*, 384 U.S. 436 (1966), without careful consideration of either the constitutional basis for such action or the destructive effects of those rules on victims of crime and society at large. *Amici* raise arguments in their brief not heretofore presented by the parties regarding the applicability of 18 U.S.C. 3501 to this case, and believe their brief will assist the Court in deciding this case.

This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Robert L. Davis contends that incriminating statements obtained from him during custodial interrogation should have been suppressed at his court-martial under an extension of the "prophylactic" rules of *Miranda v. Arizona*, 384 U.S. 436 (1966), because he made an ambiguous request for counsel during custodial interrogation. Because Congressionally-enacted statutes require a different approach—both in federal prosecutions in general, *see* 18 U.S.C. 3501, and in military courts-martial in particular, *see* Articles 31 & 36, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. 831, 836—this Court lacks authority to promulgate such a new prophylactic rule.[1]

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[1] These issues are "subsidiary questions fairly included" within the question presented. Court Rule 14.1(a). As explained in *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992), an issue is "fairly included" unless it exists "side by side [with the question presented], neither encompassing the other." Section 3501 and the provisions of the Uniform Code of Military Justice we cite bear directly on the procedures to be followed during custodial interrogation in the military and the admissibility of statements obtained during such interrogation. If (as we argue) these Acts of Congress preclude any rule suppressing confessions after an ambiguous request for counsel, then that conclusion dictates the answer to the question petitioner presents. Moreover, when resolution of a "question of law is a predicate to an intelligent resolution of the question on which [the Court] granted certiorari," it can be regarded as fairly comprised within it. *Vance v.* (continued...)

This Court has held that the prophylactic *Miranda* rules "sweep[] more broadly than the Fifth Amendment itself." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). Most significantly, this means that the government can violate *Miranda* without actually violating the Fifth Amendment. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974).

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[1] (...continued)
Terrazas, 444 U.S. 252, 258-59 n.5 (1980) (internal quotation omitted). *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In this case it would make no sense for the Court to address the procedures for handling ambiguous requests for counsel in military interrogations without addressing the governing statutes on this point.

Moreover, there is greater freedom in *responding* to a question presented, because a respondent may, without cross petitioning, "urge any grounds which would lend support to the judgment below," *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977), including "grounds different from those upon which the court below rested its judgment." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Davis will suffer no prejudice from the Court considering our line of analysis, since he will have every opportunity to provide any necessary amplification of his position in his reply brief and in oral argument. Indeed, Davis may have had an ethical duty to call the statutory provisions we discuss to the attention of this Court (and the courts below). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23.

The fact that WLF appears as an *amicus curiae* in this case does not alter the application of any of the above-recited principles. While an *amicus* may not change the question presented, an *amicus* can surely present a different line of argument on that question. *See* Court Rule 37.1. The Court has relied on arguments provided by *amici* that were not made by the parties in a case. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting) (collecting examples); *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Finally, even if the arguments we raise are somehow deemed to be outside the question presented, the Court remains entirely free to reach them, as the question-presented limitation is purely prudential and in no way affects the Court's jurisdiction. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). On the other hand, the Court may not be so free to ignore the arguments we raise, because it appears that Section 3501 denies the Court authority to grant the relief petitioner requests, *i.e.*, suppression of his incriminating statements. *See* 18 U.S.C. 3501 (mandatory language requiring that incriminating statements "shall be admissible in evidence" if voluntary).

Even the *Miranda* right to counsel is only a procedural safeguard to assure that compulsion does not materialize.

Because the *Miranda* rules extend beyond the Fifth Amendment, they are susceptible to review and limitation by Congress. In 18 U.S.C. 3501,[2] Congress has determined that all incriminating statements that are "voluntarily given" must be admitted in federal prosecutions despite any ambiguous request for counsel. Because the Fifth Amendment is not infringed by such a determination, this Court is without power to suspend the Congressional judgment and forbid the introduction of voluntary statements made after an ambiguous request for counsel.

The prophylactic rule requested by Davis is also outside the power of this Court because Congress and the President have promulgated specific rules and procedures for the conduct of military courts-martial. This Court must be particularly wary of intruding on the power of the Congress and the Commander-in-Chief over courts-martial. Under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, there is no requirement that an interrogator suspend questioning following an ambiguous request for counsel. Likewise, the Military Rules of Evidence promulgated by the President, pursuant to his authority under Article 36 of the U.C.M.J., 10 U.S.C. 836, do not allow the suppression of such incriminating statements. *See* Mil. R. Evid. 304, 305, 402.

Even if this Court has the authority to promulgate the prophylactic rule requested by Davis, it should exercise great caution before doing so. The best available evidence suggests the provisional estimate that the prophylactic *Miranda* requirements announced to date result in the loss of tens of thousands of prosecutable cases against dangerous criminals every year. The expansion of the rules suggested by Davis can only aggravate these alarming costs. Moreover, any expansion of the *Miranda* prophylaxis will

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[2] In an oral argument last Term, the Court asked numerous questions about 18 U.S.C. 3501 and received unilluminating answers. *See* Official Transcript of Proceedings before the United States Supreme Court of the United States at 18-21 & 27-28, *United States v. Green*, No. 91-1521 (Nov. 30, 1992), *cert. dismissed as moot*, 113 S.Ct. 1835 (1993).

further preempt the custodial interrogation field and dim the prospect for the exploration of superior means of balancing the interests of society and criminal suspects.

ARGUMENT

I. THE *MIRANDA* GUIDELINES ARE NOT THEMSELVES CONSTITUTIONAL REQUIREMENTS BUT RATHER ARE MERE "PROPHYLACTIC" RULES.

This Court has emphasized that the *Miranda* procedures are not themselves constitutional rights or requirements. Rather, they are only "suggested safeguards" whose purpose is to reduce the risk that the Fifth Amendment's prohibition of compelled self-incrimination will be violated in custodial questioning. This means that the government can violate *Miranda* without actually violating the Fifth Amendment—without, that is, having compelled a defendant to become a witness against himself. As explained in *Michigan v. Tucker*, 417 U.S. 433 (1974), *Miranda* established a "series of recommended 'procedural safeguards' . . . . The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Id.* at 443-44. Thus, in *Tucker*, the Court excused non-compliance with *Miranda* because failure to provide a full set of warnings "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Id.* at 446. *See Withrow v. Williams*, 113 S. Ct. 1745, 1752-53 (1993) (collecting numerous cases describing *Miranda* rights as "'prophylactic' in nature").[3] Quite simply, to violate any aspect of *Miranda*

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[3] *Withrow* refused to extend the equitable rule of *Stone v. Powell*, 428 U.S. 465 (1976), to *Miranda* claims, largely on prudential grounds. *See Withrow*, 113 S.Ct. at 1754. While *Withrow* says much about the meaning of *Stone*, it says nothing about the issue addressed in this case: the limited reach of a prophylactic rule in the face of an Act of Congress to the contrary.

is not necessarily—or even usually—to violate the Constitution.

It is sometimes said that *Miranda* established a "presumption of compulsion." *See Oregon v. Elstad*, 470 U.S. 298, 307 (1985). This description is fully consistent with viewing *Miranda* as a sub-constitutional doctrine. Despite the so-called "irrebuttable" presumption, *id.* at 307, statements taken in violation of *Miranda* may be used to impeach a testifying defendant's credibility. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). But statements that are truly involuntary or compelled are not admissible for impeachment purposes. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978). Likewise, doctrines other than impeachment turn on whether the Fifth Amendment or merely *Miranda*'s prophylactic rules were violated. Thus, while this Court applies true fruit of the poisonous tree analysis to actual violations of the Constitution, it has held that such analysis is inappropriate when the antecedent wrong is merely a violation of *Miranda's* prophylaxis. *See Oregon v. Elstad*, 470 U.S. at 317-18; *Michigan v. Tucker*, 417 U.S. at 450-52. Finally, when the Court created a public safety exception to *Miranda*, it took pains to explain that it was not creating an exception to the Fifth Amendment. *See New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984). Public safety may justify a departure from *Miranda*'s prophylaxis, but such considerations can not justify actually compelling a defendant to be a witness against himself.

All these cases demonstrate that a violation of the Fifth Amendment is not conclusively presumed to be present when *Miranda* is violated. Instead, actual compulsion in violation of the Fifth Amendment exists only where law enforcement has transgressed the standards established by the traditional voluntariness test. *See New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7; *Oregon v. Elstad*, 470 U.S. at 306-09; *Michigan v. Tucker*, 417 U.S. at 444-45. In the absence of such compulsion, there is no constitutional impediment to admitting a suspect's statements despite non-compliance with *Miranda*. *See New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7. *See generally* J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-198 (1993).

The rule that Davis asks this Court to promulgate for ambiguous requests for counsel during custodial questioning would clearly be prophylactic in nature. This Court has held repeatedly that the Sixth Amendment right to counsel does not attach until a suspect is formally accused and that the *Miranda* right to counsel at the earlier stage of custodial questioning is only a suggested safeguard against coercion that the Constitution does not require. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 424-25 (1986). Thus, Davis's ambiguous request for counsel during custodial questioning invoked, at best, not any constitutional claim of right but merely a sub-constitutional safeguard stemming from this Court's *Miranda* decision.

II. TITLE 18, SECTION 3501 TRIMS THE REACH OF THE PROPHYLACTIC *MIRANDA* RULES AND REQUIRES THE ADMISSION OF DAVIS'S VOLUNTARY STATEMENTS.

A. Section 3501 Requires the Admission of Voluntary Statements Like the Statements Made by Davis.

In 1968 Congress enacted section 3501 of Title 18—Title II of the 1968 Omnibus Safe Streets and Crime Control Act, 82 Stat. 197 (1968)—to supersede the *Miranda* rules as conditions on the admission of statements made by suspects in custodial questioning and to restore the traditional voluntariness standard for the admission of such statements. This purpose is plain on the face of the statute and was clearly understood during Congress's consideration of the legislation that became Section 3501. *See, e.g., Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 74, 110-11, 185, 194, 269-70, 579, 619-20, 849, 1173-77 (1967); S. REP. No. 1097, 90th Cong., 2d. Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2123, 2127-38.

Suppression of Davis's voluntary statements is unlawful under this statute. Section 3501(a) provides that "in any criminal prosecution brought by the United States . . . a confession *shall be admissible* in evidence if it is voluntarily

given" (emphasis added). Section 3501(b) directs the trial court to consider "all the circumstances surrounding the giving of the confession" in deciding on its admission, including a number of enumerated factors, such as the defendant's receipt or awareness of the type of information conveyed in *Miranda* warnings. These factors, however, are only to be considered as evidence "in determining the issue of voluntariness," and the statute states expressly that "[t]he presence or absence of any of the . . . factors . . . need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. 3501(b). As the legislative history of Section 3501 explains, under subsection (b) "the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors." S. REP. No. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137. In other words, the significance of the factors enumerated in subsection (b) under the statute is simply the same as their significance in the traditional voluntariness case law. *Cf., e.g., Crooker v. California*, 357 U.S. 433, 438 (1958).

There can be no credible suggestion that Davis's statements were anything other than voluntary. The only claim that he raises concerns the effect of an ambiguous remark alluding to an attorney: "Maybe, I should talk to a lawyer." Pet. Br. at 15. Questioning after such a comment is a far cry from violating the Fifth Amendment by extracting an "involuntary" confession.

B. Congress Acted Within Its Powers in Modifying *Miranda*'s Prophylactic Rules.

Section 3501 complies with the Constitution. Since the *Miranda* rules are not of constitutional stature, Congress possesses the power to modify or even abrogate them. This conclusion does not require accepting any general congressional power to pass a statute overturning a constitutional decision. But the decision at issue in this case—*Miranda v. Arizona*—is no ordinary constitutional

decision. Rather, as already discussed, *Miranda* promulgated prophylactic rules that can be violated without violating the Constitution. It is generally accepted that Congress has the final say regarding the rules of evidence and procedure in federal courts.[4] Of course, Congress cannot enact a rule of evidence that violates the Constitution. Section 3501, however, permits the introduction of only statements that are voluntary. The statute in effect simply rejects a rule of evidence that goes beyond constitutional requirements.

This Court has repeatedly held that courts must abide by a Congressional decision despite any judicially-created procedural or evidentiary rules that have previously been applied. For example, the Court has upheld Congressional modification of a Court-promulgated rule concerning prosecution production of impeaching materials on government witnesses, explaining that "[t]he statute as interpreted does not reach any constitutional barrier." *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). *Accord United States v. National City Lines*, 334 U.S. 573, 588-89 (1948) ("Our general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute . . . ."); *see also Wolfle v. United States*, 291 U.S. 7, 13 (1934); *Funk v. United States*, 290 U.S. 371, 382 (1933); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 655-56 (1835); *Wayman v. Southard*, 23 U.S (10 Wheat.) 1, 22 (1824). *See generally* J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-222 (1993); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1521 (1984) ("the federal courts have no authority to exclude evidence . . . unless the government's conduct violated the Constitution").

In reviewing the constitutionality of an Act of Congress, the Court assumes "the gravest and most delicate duty . . . [it] is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Section 3501 does

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[4] Accordingly this case presents no question about the reach of *Miranda* in state court cases.

nothing more than require the admission of statements in accordance with the applicable constitutional standard (voluntariness or non-compulsion) rather than the prophylactic standards suggested in the *Miranda* decision. Thus, invalidating Section 3501 would require an unprecedented and inexplicable finding that a statute is unconstitutional where it neither requires nor authorizes anything that the Constitution prohibits.[5] The Tenth Circuit was accordingly correct in concluding that "*Michigan v. Tucker* . . . although not involving the provision of § 3501 . . . did, in effect, adopt and uphold the constitutionality of the provisions thereof." *United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975). *See* Note, United States v. Crocker—*Setting the Stage for Miranda's Last Act?*, 47 U. COLO. L. REV. 279, 295 (1976).[6]

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[5] It is sometimes said that *Miranda*'s prophylactic approach is justified because deciding voluntariness issues on a case-by-case basis is beyond the ken of judges and is time consuming. *See, e.g.*, Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 451-53 (1987). It is clear, however, that federal courts can—and do—make such determinations quite frequently, *e.g.*, before allowing a defendant to be impeached with a statement obtained in violation of *Miranda*. Moreover, even if voluntariness determinations are difficult to make, the mere administrative convenience of the courts cannot possibly justify overturning an Act of Congress.

[6] There are no decisions to the contrary. Appellate courts in some other cases have also excused *Miranda* violations when presented with the argument that admission is required under 18 U.S.C. 3501, while declining to address the question of the statute's effect directly. *See, e.g.*, *United States v. Goudreau*, 854 F.2d 1097, 1098 (8th Cir. 1988); *United States v. Vigo*, 487 F.2d 295, 298-99 (2d Cir. 1973); *Ailsworth v. United States*, 448 F.2d 439, 440-41 (9th Cir. 1971). *Miranda*-related cases decided by the Court in recent years have generally involved state proceedings to which Section 3501 does not apply. The Court has cited Section 3501 in several cases without any indication of constitutional infirmity. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *United States v. Raddatz*, 447 U.S. 667, 678 (1980); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Keeble v. United States*, 412 U.S. 205, 208 n.3 (1973); *Lego v. Twomey*, 404 U.S. 477, 486 n.14 (1972) (quoting Section 3501 in full).

Many observers have reached the same conclusion. Of greatest interest is a report by the United States Department of Justice, which explained:

> *Miranda* should no longer be regarded as controlling [in federal cases] because a statute was enacted in 1968, 18 U.S.C. § 3501 . . . . Since the Supreme Court now holds that *Miranda*'s rules are merely prophylactic, and that the fifth amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda*, a decision by the Court invalidating this statute would require some extraordinarily imaginative legal theorizing of an unpredictable legal nature.

OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 103 (1986).[7] Most of those who testified before Congress in 1968 reached the same conclusion. *See* S. REP. No. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in*, 1968 U.S.C.C.A.N. 2112, 2137. More recently many respected authorities have expressed similar opinions.[8] In

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[7] We assume that the Department of Justice will also defend the validity of Section 3501 before the Court, since it has not given the statutorily-required notice to Congress of any intention to refrain from doing so, *see* Pub. L. No. 96-132, § 21, 93 Stat. 1049-50 (1979), extended to current fiscal year in Pub. L. 103-121, § 102, 107 Stat. 1163 (1993), and since it has previously urged the Court to admit statements under this Act of Congress, *see, e.g.*, Brief for the United States at 17-23, *United States v. Jacobs*, No. 76-1193, *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

[8] *See, e.g.*, J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 203 (1993); J. DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 295 (1991); Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176 (1988); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda*"*, 54 U. CHI. L. REV. 938, 948 (1987); Lippman, Miranda v. Arizona: *Twenty Years Later*, 9 CRIM. JUST. J. 241, 282 (1987); Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM.

(continued...)

sum, Section 3501 is a constitutional exercise of Congress' authority to trim back a Supreme Court decision creating mere "prophylactic" rules that extend beyond the Constitution.[9]

C. Section 3501 Applies to Military Prosecutions.

Section 3501 applies to federal military prosecutions. Congress chose to apply Section 3501 to "any criminal prosecution brought by the United States . . . ." 18 U.S.C. 3501(a). There can be little doubt that Davis is the defendant in a criminal prosecution brought by the United States—as the case caption in this action confirms. The reach of a Congressional enactment is determined by examining its plain meaning. *See, e.g., Union Bank v. Wolas*, 112 S. Ct. 527, 531 (1991). Since Congress has not limited the reach of the statute, its plain language—"any

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[8] (...continued)
CRIM. L. REV. 303, 307 n.8 (1987); Fein, *Congressional and Executive Challenge of* Miranda v. Arizona, in CRIME AND PUNISHMENT IN MODERN AMERICA 171, 180 (P. McGuigan & J. Pascale eds. 1986); Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1475 & n.271 (1985); Inbau, *Over-Reaction—The Mischief of* Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797, 809 (1982). *But see, e.g.*, 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.5(e) at p. 487 (1984 & 1991 Supp.).

[9] An entirely separate argument for the constitutionality of Section 3501 is based on the fact that Congress has now rejected the factual findings underpinning *Miranda*'s conclusion that custodial interrogation has an "inherently compelling" character. *Compare Miranda*, 384 U.S. at 457-58 *with* S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134. *See generally* Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 118-34; Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 n.217 (1975); American Law Division, Legislative Reference Service, Brief in Support of Constitutionality of Bill Limiting Jurisdiction of Federal Courts in Confession Cases, *reprinted in* 1968 U.S.C.C.A.N. 2146-49; *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. 925 (1967). Because (as argued here) Section 3501 is a constitutional modification of mere prophylactic rules, the Court need not reach this alternative ground for upholding the statute.

criminal prosecution brought by the United States"—applies to the prosecution of Davis.

The plain meaning of the statute is fully confirmed by "the design of the statute as a whole and . . . its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). There can be little doubt that Congress designed Section 3501 to limit "the harmful effects" of *Miranda*. *See* S. REP. NO. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2127. As the Senate Report explained, "Crime will not be abated so long as criminals who have voluntarily confessed to their crimes are released on mere technicalities." *Id.* at 2123. In view of this manifest intent, excluding military prosecutions from the ambit of the statute would require the extraordinary conclusion that Congress intended to protect crime victims in cases involving civilian criminal suspects while continuing to allow criminals victimizing the military community to be released on "mere technicalities."

One military court has stated, in *dicta*, that Section 3501 does not supersede the protections provided in Article 31 of the U.C.M.J. *United States v. Gilliard*, 42 C.M.R. 1029, 1033-34 (A.F.C.M.R. 1970) (*dicta*), *aff'd without discussion of this issue*, 20 C.M.A. 534 (1971). Whatever the merits of that conclusion, it has no application to Davis's claim. This case does not present a conflict between Section 3501 and Article 31. To the contrary, the same result is reached under both enactments. *Compare* Part II.A., *supra* (Section 3501 requires the admission of Davis's voluntary statements) *with* Part III.A, *infra* (Article 31 requires the admission of Davis's voluntary statement).[10]

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[10] In the wake of the *Miranda* decision, the U.S. Court of Military Appeals held that *Miranda* applied to military prosecutions. *See United States v. Tempia*, 16 C.M.A. 629 (1967). The basis for this holding was that in *Miranda* "the Court was laying down constitutional rules for criminal interrogation which are part and parcel of the Fifth Amendment." *Id.* at 635. The Court of Military Appeals does not appear to have specifically revisited this issue since Congress adopted Section 3501 in 1968 or since this Court has repeatedly characterized the *Miranda* rules as not "part and parcel of the Fifth Amendment," but rather prophylactic in nature. Thus, the *Tempia* decision has no bearing on the issues discussed here.

Entirely apart from the reach of Section 3501, Congress and the President have independently incorporated the statute into military procedure. In Article 36 of the U.C.M.J., Congress allowed the President to prescribe rules of trial procedures for courts-martial "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ." Pursuant to this power, the President has promulgated Military Rule of Evidence 101(b)(1), which requires courts-martial to apply "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The intent of Rule 101(b)(1) is to keep military practice and federal court practice from diverging unless there is some specifically articulated reason for doing so. *See* Mil. R. Evid. 101(b)(1), Drafters' Analysis. Since Section 3501, like all other statutes of general applicability, extends to all federal civilian criminal trials, *see* Part II.A, *supra*, it has been assimilated into military law through Rule 101(b)(1) of the Military Rules of Evidence.

III. PROPHYLACTIC SAFEGUARDS MAY NOT SUPERSEDE CONGRESSIONALLY-MANDATED RULES FOR THE CONDUCT OF MILITARY COURTS-MARTIAL.

A. Congress Has Promulgated Rules for Conducting Military Courts-Martial That Do Not Require Investigators to Clarify Ambiguous Requests for Counsel.

The rules for the conduct of military courts-martial do not require clarification of ambiguous requests for counsel as a precondition to admitting voluntary statements. Former Operations Specialist Seaman Apprentice Davis challenges a general court-martial conducted under Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. The U.C.M.J. stems from Congress' power under the Constitution "to make rules for the government and regulation of the land and naval forces." U.S. Const., Art. I, § 8. The U.C.M.J. represents Congressional rulemaking and itself provides some evidentiary rules. For present

purposes, the most important of these is Article 31, which represents the Congressional judgment as to the circumstances under which statements from the accused may be admitted in court-martial proceedings.

In Article 31, Congress provided rules governing confessions that are more limited than the *Miranda* requirements. The salient portion of the Article is:

> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Art. 31(b), U.C.M.J., 10 U.S.C. 831(b).

As is readily apparent, in Article 31 Congress provided for warnings of the right to remain silent, but made no provision for furnishing counsel during questioning—much less provision for counsel upon an ambiguous request. Accordingly, Davis's statements were obtained in compliance with the procedures Congress has specified in the U.C.M.J.[11]

In the Uniform Code of Military Justice, Congress not only set out certain procedures for courts-martial but also authorized the President—not the courts—to prescribe more detailed rules governing pretrial, trial, and post-trial procedures. *See* Art. 36, U.C.M.J., 10 U.S.C. 836. In turn, the President has exercised his powers under this statute and as Commander-in-Chief of the armed forces, U.S. Const., Art. II, § 2, by promulgating the *Manual for Courts Martial*, which contains the Military Rules of

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[11] Davis acknowledges this limitation and rather coyly states that he "does not seek any relief in this Court on the basis of Article 31(b)." Pet. Br. at 5 n.7. However, he does not address whether the limitation of Article 31(b) affects the power of this Court to grant any relief.

Evidence. Exec. Order No. 12,198, 3 C.F.R. 151 (1981). Of particular importance to Davis's suppression motion, the Military Rules of Evidence set forth quite detailed procedures concerning confessions. *See* Mil. R. Evid. 304, 305. In fact, it is fair to say that these rules codify the bulk of the *Miranda* requirements.

The Military Rules of Evidence adopted by the Commander-in-Chief, however, do not contain any requirement for military investigators to clarify ambiguous requests for counsel. Rule 305(f) provides instead that questioning shall stop "[i]f a person chooses to exercise . . . the right to counsel under this rule . . . ." *See also* Mil. R. Evid. 305(d)(2). The Military Rules of Evidence likewise make no provision for the suppression of statements obtained after an ambiguous request for counsel. *See* Mil. R. Evid. 304(a) ("involuntary" statements shall not be received in evidence); Mil. R. Evid. 304(c)(3) (defining "involuntary" statement).

The Military Rules of Evidence require the admission of all relevant evidence unless there is a basis for exclusion in some specifically-identified source. Military Rule of Evidence 402 provides broadly that "[a]ll relevant evidence is admissible, except as otherwise provided by (1) the Constitution of the United States as applied to members of the armed forces, (2) the code, (3) these rules, (4) this Manual, or (5) any Act of Congress applicable to members of the armed forces" (numbers inserted). There can be little doubt that Davis's incriminating statements were "relevant" to proving he was a murderer. *See* Mil. R. Evid. 401. Thus, for Davis to establish a ground for exclusion, he must prove that he fell into one of the five "otherwise provided" categories. He can not.

With respect to (1), as explained in Part II, a statement made after an ambiguous request for counsel is not excludable "by the Constitution." It is subject, at most, to any prophylactic rule that this Court might promulgate under *Miranda*. With respect to (2) and (3), as explained previously, neither Article 31 of the Code nor Rules 304 and 305 of the military rules authorizes exclusion. Concerning (4), there does not appear to be any other basis for exclusion in the manual. With regard to (5), Congress has expressly provided in Section 3501 that voluntary statements like

Davis's must be admitted. Thus, the rules governing courts-martial promulgated by Congress and the President as Commander-in-Chief require the admission of Davis's voluntary statements.

B. Congressionally-Adopted Rules Governing Courts-Martial Leave No Room for Prophylactic *Miranda* Requirements.

This Court may not promulgate a prophylactic rule of procedure contrary to the rules specified by Congress and the President for the conduct of courts-martial of uniformed members of the armed forces. As this Court has explained, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Judicial deference is particularly important when the Court considers a challenge to the military justice system. *See Solorio v. United States*, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); *see also Chappell v. Wallace*, 462 U.S. 296, 300-01 (1983).

In several cases, the Court has refused to extend the full protection of the Bill of Rights to the military setting. In *Middendorf v. Henry*, 425 U.S. 25, 34 (1976), for example, the Court concluded that the Sixth Amendment's right to counsel did not apply to summary courts-martial. In *Parker v. Levy*, 417 U.S. 733, 758 (1974), the Court held that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." Thus, any suggestion that the protections of the Bill of Rights apply to the military jot-for-jot is inaccurate. *See Ex parte Quirin*, 317 U.S. 1, 39 (1942) (cases arising in the land or naval forces "are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth"); Brief for the

United States, *Weiss v. United States*, No. 92-1482 (1993) ("due process does not demand that the military justice system mirror the civilian system, or that every feature deemed essential in the civil system be found in the military justice system as well"). *See generally* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1 & 2), 72 HARV. L. REV. 1, 266 (1958) (original understanding of the Bill of Rights excluded members of the armed forces). *Cf.* Pet. Br. at 37 (recognizing "divergent application of constitutional rights" in the military).

Since the Court lacks the power to override an Act of Congress trimming the *Miranda* rules for federal prosecutions generally, *see* Part II.B, *supra*, the Court certainly may not announce different procedures for the conduct of courts-martial. Indeed, because the Court has concluded that application of even clearly-established Constitutional protections to military prosecutions is not automatic, extension of "prophylactic" rules must be even more questionable. Moreover, in Article 36 of the U.C.M.J., Congress specifically assigned the task of drafting court-martial procedures to the Commander-in-Chief—not the courts. In light of this background, it would be an extraordinary and inappropriate intrusion for the Court to promulgate a new prophylactic rule excluding from courts-martial incriminating statements made after ambiguous requests for counsel when Congress and the President have dictated otherwise.

For practical reasons as well, the Court should also be quite wary of adopting rules for courts-martial outside the *Military Rules of Evidence Manual*. If this Court accepts Davis's contention and creates a new prophylactic rule covering ambiguous requests for counsel, that rule will apply to all military courts-martial and create enormous implementation problems. As the drafters of the Military Rules of Evidence explained, the codification of the rules in the *Manual* is imperative "because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries." Mil. R. Evid., Section III, Drafters' Analysis. All of these reasons suggest that the Court should not extend a new prophylactic *Miranda* requirement requested by Davis

into the "vastly different," Pet. Br. at 37, world of the military.

IV. ANY EXPANSION OF *MIRANDA*'S PROPHYLACTIC RULES SHOULD BE UNDERTAKEN ONLY WITH GREAT CAUTION BECAUSE THE EXISTING RULES HAVE CAUSED GREAT HARM.

This Court has described *Miranda* as "a carefully crafted balance designed to fully protect *both* the defendant's and society's interests." *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986). Yet any "balancing" of interests requires some attempt to measure the weights on the opposing sides of the scale. With respect to costs, it appears to be common ground that the *Miranda* litany will dissuade at least some suspects from giving important incriminating statements to law enforcement officers. *See, e.g., New York v. Quarles*, 467 U.S. 649, 657 (1984). To date, however, the Court's opinions have not contained any discussion attempting to quantify such costs. Instead, members of the Court have simply ventured the conclusion that the *Miranda* costs are, on balance, tolerable. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). Davis cites these statements in asserting that his proposed rule "is unlikely to have any appreciable costs for law enforcement." Pet. Br. at 30. Such sanguine assessments seem to assume that *Miranda* has not significantly harmed society's efforts to apprehend and convict criminals. The reasoning must be that, because the Court continues to see cases involving confessions, *Miranda* must not be causing any major adverse effects. The flaw in this argument is that it fails to consider "the loss of statements that are never obtained because of *Miranda*, voluntary statements that would help a trier of fact to determine the truth." J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 202 (1993) (internal quotation omitted).

These costs of *Miranda* remain hidden to the judicial system because the courts can never hear an appeal from a crime victim concerning a crime that remained unsolved

because of the rigid, prophylactic *Miranda* requirements.[12] Because these victims of *Miranda* are "uncertain, unnamed and unrepresented," *Miranda*, 384 U.S. at 542 (White, J., dissenting), the Court appears to have continued to overlook them. Yet without some estimate of these costs from *Miranda*—specifically, the number of cases in which "a killer, a rapist or other criminal" has been returned "to the streets," *id.*—any cost-benefit calculation is without adequate foundation.

An analysis of the hidden costs of *Miranda* requires an assessment of two factors. First, one must determine the extent to which *Miranda* has reduced the confession rate, that is, an estimate of the number of lost confessions. Not every lost confession, however, is needed for a successful prosecution. The second factor one must consider, therefore, is the importance of confessions in obtaining convictions. The next subsections of this brief use the more than a quarter of a century of experience with *Miranda* to derive some tentative estimates of these factors. This quantification of the high costs of the existing *Miranda* rules surely counsels against Davis's proposed expansion of the rules.

A. The Available Empirical Research Supports the Conclusion that the *Miranda* Rules Have Substantially Reduced the Number of Confessions Given to the Police.

The change in the confession rate due to *Miranda* can be evaluated in two ways. One measure is the reduction that was found in "before and after" studies conducted around the time of the *Miranda* decision. The other

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[12] In an effort to prove that *Miranda* has had no deleterious effects, Davis notes that today more than 70% of military cases involve guilty pleas. Pet. Br. at 31 n.30. But cases involving crimes that remain unsolved because of *Miranda* would remain hidden under his figures, which are derived from dividing guilty pleas by cases in which the investigation has proceeded to a point where the evidence permits the filing of formal charges. Likewise, statistical studies of the number of suppression motions granted under *Miranda* miss the hidden unsolved cases.

measure is a comparison of the confession rate in this country under the *Miranda* rules with the higher rate in other comparable countries that use alternative approaches to custodial interrogation. Both of these gauges point to the same conclusion: *Miranda* has caused a significant drop in the confession rate.

1. *Assessments Taken Before and After* Miranda *Show a Substantial Drop in the Confession Rate.*

The before-and-after-*Miranda* studies show that the decision had "a major adverse effect on the willingness of suspects to respond to police questioning." OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 62 (1986) (hereinafter cited as "OLP PRE-TRIAL INTERROGATION REPORT"). Perhaps the best study on the effect of *Miranda* on the confession rate is one Professors Seeburger and Wettick published concerning interrogations in serious crimes in Pittsburgh. They found that before *Miranda* Pittsburgh detectives obtained confessions in 54.4% of the cases (even though they gave some warnings to suspects); after *Miranda*, the rate was 37.5%, a 16.9% reduction. Seeburger & Wettick, Miranda *In Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 11 (table 1) (1967).

District Attorney Frank Hogan of New York County, New York collected statistics for presentations to the grand jury in his county. In the six months preceding *Miranda*, 49.0% of the felony defendants made incriminating statements. In the six months after *Miranda*, the number fell to 14.5%, a 34.5% decline. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1120 (1967) (hereinafter cited as *Controlling Crime Hearings*).

In Philadelphia, then-District Attorney Arlen Specter reviewed the experience of the Philadelphia Police Department with *Miranda*. In October 1965, Philadelphia police began advising suspects of their right to counsel and 31.7% of individuals arrested refused to give statements. One year later, after the full *Miranda* warning-and-waiver regime took effect, 59.3% of individuals refused to give

statements, a 27.6% reduction in the willingness of suspects to provide statements. *See Controlling Crime Hearings*, *supra*, at 200-01.

District Attorney Aaron Koota of Kings County, New York, also testified before the Judiciary Committee. He reported that before *Miranda* for crimes such as homicide, robbery, rape, and felonious assault, approximately 10% of suspects refused to make statements. Following the decision, 41% refused to make statements, a 31% decline in willingness to speak to investigators. *See Controlling Crime Hearings*, *supra*, at 223.

James W. Witt surveyed the effect of *Miranda* on police in "Seaside City," a pseudonymous enclave in the Los Angeles area with a population of 83,000. He found a two percent decrease in the rate at which police obtained incriminating statements after *Miranda*, from 69% to 67%. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice*, J. Crim. L. & C. 320, 325 (1973). Other quantitative studies besides these five have been done, but all appear to have major flaws that render their data unreliable or unhelpful. *See generally* OLP Pre-Trial Interrogation Report, *supra*, at 63.[13]

2. *Confession Rates in this Country are Much Lower than in Countries That Have Not Imposed Rigid Right-to-Counsel and Waiver Rules for Custodial Interrogation.*

An examination of the experience in other countries can also be useful in assessing the effects of *Miranda*. *See New York v. Quarles*, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part and dissenting in part) (footnote omitted). A review of data from other countries confirms the

[13] For example, the Project of the *Yale Law Journal* (cited in Pet. Br. at 31) found a ten to fifteen percent decline in the confession rate from 1960 to 1966 in New Haven. Project, *Interrogations in New Haven: The Impact of* Miranda, 76 Yale L.J. 1519, 1573 (1967). However the editors were suspicious of their pre-*Miranda* data for various reasons, *id.* at 1573, and their post-*Miranda* data is of limited value because the New Haven police in the time period surveyed (the summer of 1966) did not comply with *Miranda*, *see id.* at 1550.

conclusion that *Miranda* has adversely affected the ability of police officers to obtain incriminating information.

A good country for comparison is England. The historically-prevailing English approach gave suspects the equivalent of the first two *Miranda* warnings, but did not employ the other features of the *Miranda* system—right to counsel, waiver requirements, etc. *See* OLP Pre-Trial Interrogation Report, *supra*, at 84-86.[14] The available studies report very high confession rates in various English jurisdictions. For example, a study of Worcester found that suspects gave full confessions or made other incriminating statements in 86% of all cases. *See* Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 Crim. L. Rev. 596, 598. A study of cases at the Old Bailey found an incriminating statement rate of 76%. *See* Zander, *The Investigation of Crime: A Study of Cases Tried at the Old Bailey*, 1979 Crim. L. Rev. 203, 213 (table 4). Other studies likewise report high rates of confessions and few suspects who remain silent. *See* Lidstone, *Investigative Powers and the Rights of the Citizen*, 1981 Crim. L. Rev. 454, 464-65 (collecting studies). These reported rates are substantially higher than the post-*Miranda* confession rate in the United States, where police obtain incriminating statements in at most 40 to 50 percent of all cases. *See* Part IV.A.1, *supra*; Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wisc. L. Rev. 1121, 1195 & n.367 (collecting studies).

Another good country for comparison is our neighbor, Canada. The historically-prevailing approach of the Canadian police was to give *Miranda*-style warnings concerning the right to remain silent, but not to follow the rigid *Miranda* waiver requirements and questioning cut-off rules. *See generally* Caswell, *The Law Reform Commission of Canada, the Proposed Canada Evidence Act and Statements by an Accused*, 63 Can. B. Rev. 322 (1985); Pye, *The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective*, 45 L. &

[14] Recent modifications of the English approach to custodial interrogation are discussed in Part V, *infra*.

CONT. PROB. 221 (1982).[15] The Canadian approach appears to produce confession rates substantially higher than the rates in this country. For example, in July 1985 the Halton Regional Police Force in Ontario, Canada undertook a two-year pilot project in one of their districts involving the videotaping of all interviews at the police station for crimes more serious than traffic and drunk driving offenses. *See* LAW REFORM COMMISSION OF CANADA, THE AUDIO-VISUAL TAPING OF POLICE INTERVIEWS WITH SUSPECTS AND ACCUSED PERSONS BY HALTON REGIONAL POLICE FORCE, ONTARIO, CANADA, AN EVALUATION (3rd Interim Report 1987). Despite the presence of videocameras to prevent police misconduct, the officers obtained very high confession rates of 70% or more and a refusal-to-talk rate of only 4%. *Id.* at 4.

B. Confessions Are Needed to Solve a Significant Proportion of Criminal Cases.

It has long been recognized that "[q]uestioning suspects is indispensable in law enforcement." *Columbe v. Connecticut*, 367 U.S. 568, 578 (1961) (Frankfurter, J.) (internal quotation omitted). Some quantification of the importance of confessions to successful prosecution is available. The Pittsburgh study found that, of total cases, a confession was needed to convict in 20.2% of all cases. Seeburger & Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 15 (1967) (table 4). The New Haven Project estimated that in the cases they observed interrogation was "essential" in 3.3% and "important" in 10.0%, for a combined "interrogation necessary" category of 13.3%. *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1585 (1967) (table 20). The "Seaside City" study used the *Yale Law Journal* methodology and concluded that interrogation was "necessary" in 23.6% of all cases. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. &

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[15] Recently Canadian law on interrogation has become somewhat uncertain because of the passage of section 10(b) of the Canadian Charter of Rights and Freedoms. *See* Michalyshyn, *The Charter Right to Counsel: Beyond* Miranda, 25 ALBERTA L. REV. 190 (1987).

CRIMINOLOGY 320, 324 (1973) (table 2). Thus, without confessions, a significant percentage of cases cannot be successfully prosecuted.

C. Reasonable Estimates Suggest that *Miranda* Results in the Loss of Tens of Thousands of Prosecutable Criminal Cases Each Year.

This Court has not attempted to quantify the number of criminal cases that are lost each year because of the *Miranda* decision. Yet it is possible to tentatively calculate such a cost using the available reliable studies. The hidden cost of *Miranda* in terms of the percent of lost convictions per year can be determined by multiplying (1) the reduction in confession rate because of *Miranda* (in percentage terms) by (2) the number of cases in which confessions are needed to convict (in percentage terms). Even defenders of *Miranda* recognize that this is the proper methodology. *See, e.g.*, C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 382 (3rd ed. 1993).[16] The absolute number of cases that are lost because of *Miranda* can be estimated by multiplying that percentage figure by the number of criminal suspects who are interrogated.

The available data allows a provisional completion of the equation. First, as recounted in Part IV.A.1, *supra*, the "reliable" before-and-after-*Miranda* studies—from Pittsburgh, New York County, Philadelphia, Kings County, and Seaside City—show confession rate[17] declines of 16.9%, 34.5%, 27.6%, 31.0%, and 2.0%, for an average reported decline

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[16] Recognizing that law enforcement officers do not interrogate every suspect would not significantly change the figures reported in this brief, since it appears to be standard practice to interrogate suspects in a very high percentage of cases. *See, e.g.*, U.S. DEPT. OF JUSTICE, NATIONAL INST. OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 143 (1983); Seeburger & Wettick, *supra*, at 7.

[17] The studies from Philadelphia and Kings County measured changes in the refusal-to-talk rate rather than the confession rate. However, this change appears to be a reasonable surrogate for the reciprocally-related change in the confession rate.

of 22.4%.[18] The average also corresponds roughly to the difference between the post-*Miranda* confession rate in this country and the confession rate in England and Canada, based on the figures reported in Part IV.A.2, *supra*. Second, as recounted in Part IV.B, *supra*, an estimate of the importance of confessions can be derived from the average of the reliable studies on the subject—from Pittsburgh, New Haven, and Seaside City—which report confessions are necessary in an average of 19.0% of all cases.

Combining these figures produces the following result:

22.4% x 19.0% = 4.3%.

In other words, the existing empirical evidence supports the tentative estimate that *Miranda* has led to lost cases (that is, the loss of evidence necessary to convict a suspect[19]) against more than four percent of all interrogated criminal suspects in this country. One definitional point should be emphasized. This estimate of lost cases does not include cases in which police obtained a voluntary confession in violation of the *Miranda* rules that will therefore be suppressed at later stages of the criminal justice process. Instead, this estimate measures only the "hidden cases,"

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[18] These changes are not attributable to any disappearance of third-degree tactics. First, such methods were almost "nonexistent" by the time of the *Miranda* decision. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (Feb. 1967). *See* F. GRAHAM, THE SELF-INFLICTED WOUND 22 (1969); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 386 (1965). Second, the *Miranda* rules were poorly suited to stop malevolent police officers bent on extracting truly involuntary confessions. *See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.").

[19] These "lost cases" are not necessarily the same as lost convictions, but rather the cases in which, due to *Miranda*, prosecutors did not receive a confession and that confession was necessary to convict. It may be that some viable criminal cases that are presented to prosecutors will be dismissed or pled down for reasons that have nothing to do with the *Miranda* decision.

cases in which police never obtained confessions because of the *Miranda* rules.

Obviously this estimate is tentative. It involves averaging the available reliable studies and extrapolating across all offenses across the country. It also involves assuming that there have been no significant changes since the late 1960s in either the ability of law enforcement to obtain confessions or the importance of confessions to successful prosecution. But until further research on such questions is undertaken, a cost of approximately 4.3% of all serious cases would seem to be the best available estimate.

To reach an "absolute" number of criminals involved in these cases, it is necessary to multiply the percentage figure previously reported by the number of suspects interrogated. No national statistics are available on the number of suspects interrogated. A surrogate number is the number of suspects arrested for serious crimes, which is readily available in the Federal Bureau of Investigation's annual *Uniform Crime Reports* ("UCR"). Although "arrest" can be defined differently by various police agencies, the operational definitions for reporting purposes seem to coalesce around events such as "brought to the station" or "booking." *See* NATIONAL INST. OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 40-41 (1983). These appear to be definitions that would correspond roughly with police opportunities for custodial interrogation.

Multiplying the *Miranda* cost figure of 4.3% by the latest UCR arrest figures for serious index crimes, U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1992 at 217 (1993) (table 29), suggests the tentative estimate that in 1992 alone *Miranda* produced more than 30,000 lost cases against criminals who committed violent crimes and 90,000 lost cases against criminals who committed serious property crimes. These are significant numbers and certainly suggest caution before expanding the prophylactic requirements of *Miranda*. Indeed, the Court has relied on smaller figures in creating a good faith exception to the Fourth Amendment exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 907-08 & n.6 (1984). It should be noted that, unlike the costs of the exclusionary rule (which are concentrated in

narcotics and other contraband offenses), the costs of the *Miranda* rules fall across the full spectrum of criminal offenses, including such crimes of violence as murder, rape, robbery and aggravated assault.

V. TREATING THE *MIRANDA* RULES AS SUBJECT TO CONGRESSIONAL MODIFICATION WILL SPUR THE SEARCH FOR SUPERIOR ALTERNATIVES.

Beyond the release of dangerous criminals, perhaps the greatest tragedy of the *Miranda* decision is that it has blocked the search for superior approaches to custodial interrogation, alternatives that might better protect not only society's interest in apprehending criminals but also criminal suspects' interests in preventing coercive questioning. *Miranda* itself seemed to invite exploration of alternatives. 384 U.S. at 467 ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform"). In the quarter of a century since *Miranda*, however, reform efforts have been virtually nonexistent. As the Office of Legal Policy concluded:

> The *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.

OLP PRE-TRIAL INTERROGATION REPORT, *supra*, at 99.

This period of stagnation in the United States should be contrasted with reform efforts in other countries. England provides perhaps the best example. In 1984, Parliament passed the Police and Criminal Evidence Act (PACE), 1984, ch. 60. The Home Office followed up with the Code of Practice for the Detention, Treatment and Questioning of

Persons by Police Officers (1985) and the Code of Practice on Tape Recording (1988). These enactments provide a series of protections for suspects, including recording of interrogations, while attempting to provide police officers with a reasonable opportunity for questioning. It seems difficult to quarrel with the assessment that "[t]he results of the British experience thus far further demonstrate that the police interrogation process in the United States would benefit from a comparable effort." Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation*, 24 U. MICH. J. L. REF. 1, 64 (1990). Australia and Canada have also considered reforms. *See* LAW REFORM COMMISSION OF CANADA, REPORT 23: QUESTIONING SUSPECTS (1984) (proposing videotaping and other reforms); *McKinney v. The Queen*, 65 A.L.J.R. 241 (Austl. 1991) (endorsing fairness and recording requirements).

In this case, the Court has the opportunity to unfetter Congress and, perhaps, the state legislatures around the country. A ruling upholding Section 3501 or the provisions of the U.C.M.J. dealing with questioning—or at the very least an encouraging word about the constitutional viability of reform enactments—could be expected to set off exploration of other approaches to dealing with custodial interrogation.[20] As *Miranda* itself recognized, 384 U.S. at 467, there is no reason to believe that the Court can fashion rules regulating police questioning that are the best accommodation of the competing concerns. A ruling recognizing flexibility in this area would allow a "wide range of fundamental issues that have been foreclosed by *Miranda* [to] once again become open to study, debate, negotiation and resolution through the democratic process, restoring 'the initiative in criminal law reform to those forums where it truly belongs.'" OLP PRE-TRIAL INTERROGATION REPORT, *supra*, at 118-19, *quoting Miranda*, 384 U.S. at 524 (Harlan, J., dissenting).

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[20] For example, the investigative agency involved in this case (the Naval Investigative Service) already has in place disciplinary procedures for any agents who intentionally violate interrogation rules. *See* NAVAL INVESTIGATIVE SERVICE, MANUAL FOR ADMINISTRATION (NIS-1), chapt. 18, add. 1, p. 18-9 (Sept. 1990).

CONCLUSION

For the foregoing reasons, your *amici* respectfully request that the decision of the United States Court of Military Appeals refusing to suppress Davis's incriminating statements be upheld.

Respectfully submitted,

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